Supreme Court, U.S.
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No. 95-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DR. LEONARD JEFFRIES, JR.,

Petitioner,

v.

BERNARD HARLESTON, individually and in his official capacity as President of City College of New York, W. ANN REYNOLDS, individually and in her official capacity as Chancellor of City University of New York, JAMES P. MURPHY, EDITH B. EVERETT, HERMAN BADILLO, SYLVIA BLOOM, GLADYS CARRION, LOUIS C. CENCI, MICHAEL J. DEL GUIDICE, STANLEY FINK, WILLIAM R. HOWARD, HAROLD M. JACOBS, SUSAN MOORE MOUNER, CALVIN O. PRESSLEY, and THOMAS TAM, individually and in their official capacities as Trustees of City University of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the principles enunciated in *Waters v. Churchill* with respect to the conditions under which the government, as employer, may punish an employee for speech, were properly applied by the Second Circuit Court of Appeals to *Jeffries v. Harleston, et al.* ("*Jeffries*")

2. Whether the Circuit Court erred in failing to balance the interests of the parties as required by *Pickering v. Board of Education.*

3. Whether, as a matter of law and considering the interests of the Petitioner in his First Amendment rights and his exercise of academic freedom, the Respondents met their burden of justifying their denial of Petitioner's Chairmanship in response to his speech.

4. Whether the Principle of "reasonable expectation" is without limitation or qualification with respect to time, circumstances and actual conditions known to the employer at the time an employee is punished for his speech.

LIST OF PARTIES

The appellee below, Dr. Leonard Jeffries, Jr., is the Petitioner here.

The following parties were appellants in the court below: Bernard W. Harleston, formerly the President of The City College of The City University of New York ("the College"); W. Ann Reynolds, the Chancellor of The City University of New York ("the University" or "CUNY"); and James P. Murphy, Edith B. Everett, Herman Badillo, Sylvia Bloom, Gladys Carrion, Louis C. Cenci, Michael J. Del Guidice, Stanley Fink, William R. Howard, Harold M. Jacobs, Thomas Tam, members of the Board of Trustees ("the Board") of the University.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals about which review is sought is reported at 52 F.3d 9, and is reproduced in the appendix at 1a. The opinion of the court of appeals dated April 18, 1994, is reported at 21 F.3d 1238 (2d Cir. 1994) and is reproduced in the appendix at 50a. Those opinions and orders of the District Court, dated March 31, 1993, April 21, 1993, and May 11, 1993 are reported at 820 F.Supp. 736 (S.D.N.Y. 1994), 820 F.Supp. 739 (S.D.N.Y. 1993), and 820 F.Supp. 741 (S.D.N.Y. 1993), and reproduced in the appendix at 86a, 82a, and 76a, respectively.

JURISDICTION

The judgment of the court of appeals was entered April 4, 1995. This court has jurisdiction to hear this petition pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are the First Amendment to the Constitution of the United States and 42 U.S.C. Section 1983.

STATEMENT OF THE CASE

This case is about the denial of freedom, academic freedom and freedom of speech. It involves the right of a public employee to speak as a scholar and private citizen on matters of public concern, without fear of government reprisal. This case addresses the parameters of governmental response to the protected speech of its employees when individuals, acting on behalf of the gov-

ernment, disagree with the content of that speech. This case challenges the court to define whether and to what extent the government, as employer, is bound by time and circumstances when relying upon the affirmative defense of reasonable expectation of disruption, to justify punishing an employee in response to protected speech, and to define whether and to what extent the passage of time and existence of circumstances increases the government's burden, and reduces the weight of the government's interests in balancing the interests of the parties. This case is about the failure of the Court of Appeals to fulfill its duty and obligation to consider all of the facts, to determine and weigh the respective interests of the parties, and then to balance those interests *before* determining whether or not an employee is entitled to the protection of the First Amendment.

1. Background.

On July 21, 1991, the Petitioner, a tenured Professor of Black and Africana Studies at the City College of New York (the "College"), and Chairman of the College's Black Studies department (the "Department"), gave a speech (the "Speech") in Albany, New York at a Black Arts and Cultural Festival. The Speech was heard by several hundred people who gave the Petitioner a standing ovation at its conclusion, and was broadcast several times thereafter on cable television stations in the Albany area. No one disagreed that the Speech, which addressed curriculum reform in the State of New York and throughout the United States, dealt substantially with an issue of public concern. The issue is one that has aroused great emotion and controversy because it touches on race and ethnicity, inter-group relationships, the battle for control of the dollars and pedagogical direc-

tion of our public schools and the sometimes rough politics of the academicians involved therewith. Petitioner made the Speech as a private citizen speaking on matters of public concern, outside of the scope of his employment, at a time and place unrelated to his employment or his employer.

The Speech initially provoked thought and debate but not public furor, until cast in the light of anti-Semitism by a New York tabloid known for its penchant to fuel controversy and discord by misrepresenting and sensationalizing events.

Following the efforts of this tabloid the Speech became a political football, passed from one politician to another, from one talk show host to another, and finally to the Respondents' Board room.

The Speech was considered by some to be anti-Semitic, by others it was not. The opinions expressed in the Speech were considered by some to be improper, by others they were not. By definition then, the Speech became controversial, causing the Respondents to speak out against the Speech, to threaten the Petitioner, and later to examine whether the Speech had any impact on Petitioner's ability to function as Chairman of the Department or whether it had any disruptive impact on the Department, the College or the City University of New York (the "University"). This examination took place almost immediately following the Speech and was based on the Respondents' alleged fear or expectation of disruption. As a consequence of this examination, reports were generated by the Dean of the College Jeffrey Rosen (109a and 112a), and the College's Provost, Robert Pfeffer (114a). These reports concluded that Petitioner continued to function and to work with all elements of the College and University community. There was no

finding and no report of any failure, refusal or inability of any student, administrator or faculty member to work with the Petitioner in performing their respective duties related to the Department, the College or the University. In fact, prior to the Respondent's denial of the Petitioner's term as Chairman in March of 1992, the Faculty Senate of the College, comprised of Petitioner's colleagues, passed a resolution which disagreed with and condemned some of Petitioners Speech, but which stated, in no uncertain terms, that this group of Petitioner's peers and colleagues repudiated "as incompatible with academic freedom, any attempt, whether originating from inside or outside the College, to discipline a faculty member, because he or she expresses provocative and controversial, even offensive, views and called on those who may disagree with the substance of Professor Leonard Jeffries, Jr.'s views to challenge their accuracy and cogency in the free exchange of ideas." (122a).

On or about March 28, 1992, the Respondents voted to replace the Petitioner as Chair of the Department. They did so because they disagreed with the content of his Speech. At that time, eight (8) months following the Speech and on the heels of a media effort to make the Speech an every day issue, the Respondents had not been confronted with nor were they aware of any disruption to the Department, College or University, as a consequence of or caused by the Speech. At that time, the Respondents disagreed with the Speech but had no basis upon which to conclude that the Speech had been or would be disruptive. Following the Respondents action, as aforesaid, the Petitioner filed suit in the District Court.

2. The Trial.

At the trial of the matter, the Respondents testified that they removed the Petitioner because he performed poorly as Chairman and had engaged in undesirable acts. They also testified that the fallout from the Speech had a disruptive effect on the Department, the College and the University. This was their testimony but it was unsupported by any credible evidence whatsoever. In fact, on cross examination, Respondents' witnesses could not identify any disruption caused by the Speech. Nor, did they or could they provide any facts to justify any continuing expectation of material harm or disruption beyond March 1992.

When asked to identify disruption or harm caused by the Speech, the Respondent Chancellor Ann Reynolds could not (125a), nor could Respondent, President Bernard Harleston (127a). Moreover, Respondent Stanley Fink, a member of the Board, testified that the public response to the Speech was in reality no greater than the response of the public to other matters of public concern (131a).

The jury, therefore, concluded that all of the Respondents acted against the Petitioner in retaliation for his Speech (see response to Interrogatories #1 and #2, 76a), there being no other reason or explanation. This conclusion was supported by the trial judge and by the court of appeals on their review and assessment of the trial record. Of importance here is the fact that the jury, in response to Question #4 on Verdict Form #1 (77a) determined that the Respondents were motivated by a reasonable expectation that the Speech would cause disruption, but that six (6) of the Respondents acted with malicious intent to violate the Petitioner's First Amendment Rights or to unlawfully injure him with callous or reckless disregard of his rights. In agreeing to remove the Petitioner,

the nine (9) Respondents about whom the jury found no malice, relied exclusively on the information and recommendations of Reynolds and Harleston about whom the jury found malice (133a and 134a). They made no independent assessment of Petitioner's status, his performance or the impact of his Speech. They acted only to ratify the recommendations of persons whose goals were clearly to punish Petitioner because they disagreed with the content of his Speech.

3. The Court of Appeals Decision Dated April 18, 1994.

The Respondents appealed to the court of appeals seeking reversal of the District Court judgment or a new trial. The court of appeals denied the Respondents' appeal, affirming the jury verdict and judgment of the District Court except to the extent that it vacated the award of puntivie damages (75a), remanding for a new trial to determine whether the Petitioner should recover punitive damages. The basis of the remand was the court of appeals' concern over what it viewed as an inconsistency in the jury's verdict. The jury found, on the one hand, that Petitioner was entitled to punitive damages and it found, on the other hand, that the Respondents were motivated by a reasonable expectation that the Speech would cause disruption.

The jury Verdict Form #1, which contained the questions about reasonable expectation, referred to the Defendants' "actions" (77a) which, in the context of the trial, may in the jury's mind, have included the review of Petitioner's performance, the temporary limitation of Petitioner's term, and the ultimate denial of Petitioner's Chairmanship, *or*, it may only have included the former and not the latter. Nevertheless, the jury determined that

the act of denying Petitioner his term was malicious and that it was the Speech that motivated all of the Respondents' actions. The confusion develops because the jury found that nine (9) of the Respondents were without malice and that there was an expectation of disruption. This led the circuit court in its April 1994 decision to conclude that a new trial was necessary on the issue of damages as it could not reconcile this inconsistency.

4. The Order of the Supreme Court of the United States Remanding the Case for Re-Consideration in Light of *Waters v. Churchill.*

The Respondents filed a Petition for a Writ of Certiorari. The Petition was granted and the case was summarily disposed of with an Order (15a) remanding the case to the circuit court with instructions to reconsider, in light of *Waters v. Churchill.*

5. The Court of Appeals Decision.

On remand, the court of appeals requested and received letter briefs restricted to the issue of the applicability of *Waters* to *Jeffries.* (Reproduced in the Appendix at 16a, 28a, 36a, and 45a) The court of appeals reversed the judgment of the District Court and remanded with instructions to enter judgment for the Defendants (Respondents here) (14a). In its decision, the court of appeals reiterated its earlier conclusion that the Speech "squarely involved issues of public concern," but failed to identify and balance the interests of the parties.

The court of appeals did examine the impact of *Waters* and determined that the *Waters* "test" did not require that injury caused by the employee's speech be actual, but rather that "the government's burden is to

show that the speech threatened to interfere with government operations (9a). The circuit court further stated that it "read the *Waters* plurality opinion to hold that the closer the employee's speech reflects on matters of public concern, the greater must be the employer's showing that the speech is likely to be disruptive before it may be punished" (10a).

The court of appeals established for itself certain parameters for review before determining, in light of *Waters*, whether or not Respondents had violated Petitioner's free speech rights. It concluded that Respondents did not violate Petitioner's free speech rights if:

"1) it was reasonable for them to believe that the Albany Speech would disrupt CUNY operations;

2) the potential interference with CUNY operations outweighed the First Amendment value of the Albany Speech; and,

3) they demoted Jeffries because they feared the ramification for CUNY, or at least, for reasons wholly unrelated to the Albany Speech."

In conclusion, without evaluating the foregoing, the court of appeals reasoned that because nine (9) of the Respondents were motivated by a reasonable expectation of disruption in denying the Petitioner his Chairmanship, the Petitioner has not suffered a deprivation of his Constitutional rights.

The court dismissed the concerns of the University Faculty Senate, expressed in its Amicus brief (97a), that the application of *Waters* to *Jeffries* would be detrimental to the concept of academic freedom. The Court cited *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) and stated that Petitioner was still a "tenured professor at CUNY and the defendants have not sought

to silence him or otherwise limit his access to the market place of ideas in the classroom."

REASONS FOR GRANTING THE PETITION

In this case, the court of appeals has interpreted *Waters v. Churchill* as requiring judgment in favor of the government or employer, simply by the virtue of the existence, without more, of a reasonable expectation of disruption, thereby eliminating the balancing test required since *Pickering v. Board of Education*, 391 U.S. 563 (1968). It is important, not only that this Court confirm the continuing validity of *Pickering* and its progeny, but also that this Court provide some guidance as to the necessary components of the expectation and relative weight to be accorded to such components on the *Pickering* scale.

The decision of the Court below is inconsistent with the post-*Waters* decisions of this Court and the decisions of most other circuits which have considered First Amendment cases in light of *Waters*. Other decisions in the post-*Waters* era have continued to identify and weigh the interests of the employer *and* the employee, and to carefully weigh the components of those interests before reaching a conclusion as to the application of First Amendment protections to the employee's speech.

There is also the question as to whether *Waters* was meant to be applied to circumstances where the interests of the employee are so strong relative to free speech in the context of academic freedom, and where the speech in question, unlike *Waters* and others, occurs in a time, at a place, and under circumstances wholly unrelated to the speaker's employment or to the speaker's employer.

Finally, it is respectfully submitted, that the concept of "reasonable expectation" as interpreted by the Second Circuit, is vague, ambiguous and incapable of consistency, if expectation is not defined in terms of time and circumstances by this Court.

I.

THE DEPRIVATION OF FIRST AMENDMENT AND ACADEMIC FREEDOMS REQUIRES MORE THAN THE MERE SHOWING THAT THERE WAS A REASONABLE EXPECTATION OF DISRUPTION.

Waters v. Churchill, 114 S.Ct. 1878 has changed the face of the First Amendment as it affects free speech for public employees, and now, with the application of *Waters* to *Jeffries*, by the Second Circuit Court of Appeals, the face of academic freedom is threatened with near extinction. Notwithstanding the court of appeals' statement that Petitioner still maintains his position as a tenured professor and that he remains able to exercise a degree of academic freedom in the classroom, the fact is that Petitioner lost his Chairmanship, following a speech on academic and political issues, as a result of the Respondent's reaction to his Speech. As a consequence, every non-tenured teacher or scholar in this nation, employed by a public institution, is now chilled by this decision and subject to punishment as a consequence of his or her speech. This "chilling effect" is unparalled and unless narrowed by this court, the application of *Waters* to cases involving the expression of ideas based in academia, will close the door of the marketplace to those ideas finding disfavor with whomever happens to be sitting in the seat of power and authority at the time of the utterance. This has always been unacceptable, and should not be acceptable now.

In its decision, the court of appeals failed to do anything other than conclude that nine (9) of the Respondents had a reasonable expectation of disruption when they voted to deny the Petitioner his position as Chair.

This, without more, is not in compliance with the criteria established by *Pickering.* As *Pickering* is still good law, the circuit court's failure to employ the balancing test required by *Pickering* is fatal to the ability of its Decision to withstand scrutiny. The Second Circuit was required to strike a "balance between the interest of the employee, as a citizen, in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." (*Pickering*) Even though *Waters* added another dimension to the *Pickering* balancing test, it did not eliminate that test.

Just as the conclusion that the Petitioner's Speech touched substantially on a matter of public concern, does not alone afford the protection of the First Amendment, the conclusion that the government acted as a result of an expectation of disruption, is not of itself conclusive evidence that First Amendment protection may properly be withdrawn.

The government has the burden of justifying the discharge of an employee, and that burden varies depending upon the nature of the employee's expression, *Connick v. Meyers*, 461 U.S. 138. In meeting that burden, the government must give the court components beyond the mere belief of expectation to place as weights on the *Pickering* scale. The court of appeals made no effort to determine the interests of the parties and, therefore, made no effort to balance those interests. In *Waters*, this Court examined the facts and etermined the level and

potential disruptiveness of the employee's speech. In *Waters,* this Court's finding of potential disruption did not come about until after the court examined evidence:

1. That a potential employee may have been discouraged in working for a department in the hospital;
2. That the disciplined employee's complaints threatened to undermine management's authority; and,
3. That the employee stated that it wasn't possible to wipe the slate clean between her and her supervisors.

These factors apparently gave weight to the potential disruptiveness of the employee's speech in *Waters,* weight that tipped the scales in favor of the government.

It is clear, from *Pickering*, through its progeny, to *Waters* and beyond, that every case except *Jeffries*, has involved an identification or consideration and then a weighing of the interests of the parties, after it was determined that the speech in question was on a matter of public concern. In *Jeffries*, following the finding that the Speech indeed touched on a matter of public concern, the court of appeals paid only minor lip service to the balancing requirement detailed in *Pickering*, and then ignored it altogether.

The court of appeals never sought to identify or define the Respondents' interests. Had it done so, it would have weighed the only interest truly expressed by the Respondents, and that was the interest of the Respondents in preserving and imposing their views, as contained in the Respondents so-called "Mission," in place and in stead of any views held and expressed by the Petitioner. This was the disruption found by the Respondents. The expec-

tation of this type of disruption, real or otherwise, is entitled to very little weight on the *Pickering* scale. Moreover, the court of appeals, had it examined the Respondents' interests, would have been confronted with a reasonable expectation of only minor disruption based on the facts available to the Respondents, at the time they deprived Petitioner of his Chairmanship in response to his Speech.

This reasonable expectation of minor disruption, along with the expressed interest of the Respondents in imposing the idealogy of their "Mission," would have only been weights on the scales, not the dispositive factors the Second Circuit thought them to be. (*See Porter v. Califano*, 592 F.2d 770 (5th Cir. 1979); *Czurlanis v. Albanese*, 721 F.2d 98 (3d. Cir. 1983); *Zamboni v. Stamler*, 847 F.2d 73). In comparison, the weights on the Petitioner's scale would include:

1. the public's interest in free and unhindered debate on an issue of public importance. (*Versarge v. Clinton*, 984 F.2d 1359) (3d Cir. 1993);
2. the public's right to be exposed to diverse and varied ideas;
3. the interest of the Petitioner in commenting upon matters of public concern; and
4. the interest of the Petitioner as a scholar and the interests of his colleagues in the unfettered exercise of academic freedom.

When a court is required to determine the validity of a restraint on free speech, it must arrive at a balance between the interests of the employee as a citizen in commenting on matters of public concern, and the interest of the State as employer, in promoting the efficiency of the public services it performs through its employees.

U.S. v. National Treasury Employee's Union, et al., 115 S.Ct. 1003 at 1012, quoting *Pickering.*

A finding of likely disruption must be based on some evidence and must be reasonable. See *Waters, Rankin v. McPherson* at 483 U.S. 378 and *Pickering.* Where likely disruptiveness is found, its components become factors to be reviewed and analyzed. Where the court fails to review and analyze the factors supporting the likelihood of disruption, it also fails to utilize the balancing test required by *Pickering* and reinforced by *Waters.* (*Watters v. City of Philadelphia*, 1995 WL 327127 (3rd Cir. (Pa)).

Here, the Second Circuit did not review and analyze the factors supporting the likelihood of disruption in order to determine their relative weight. The Second Circuit also failed to identify and analyze the factors on the Petitioner's side of the scale. This result is inconsistent with prevailing case law and should be reversed.

II.

THE APPLICATION OF *WATERS* TO *JEFFRIES* WAS IMPROPER.

In the case of *Waters v. Churchill*, the issues involved a government employee whose speech concerned or impacted her employment. Similarly, other cases preceding and subsequent to *Waters*, have all involved speech in someway connected to the employee's employment with the government. Most recently, the Courts have decided numerous cases citing *Waters,* including *Luck v. Mazzone,* 52 F.3d 475 (2d Cir. 1995), involving an employee of the State Court system; *U.S. v. National Treasury Employees Union*, 115 S.Ct. 1003, involving federal employees subject to the Ethics in Government Act; *Watters v. City of Philadelphia*, 1995 WL 327127 (3rd Cir. Pa) involving

an employee of the City of Philadelphia terminated from his employment for public criticism of a program of his employer; *Dambrat v. Central Michigan University*, 1995 WL 328470 (6th Cir. (Mich.)) involving a coach employed by a State university who used racially derogatory terms during a locker room session with his players; and *Tindel v. Caudell,* 1995 WL 341529 (8th Cir. (ARK)) involving a policeman who appeared at a public gathering attended by fellow officers, members of the policeman's organization, wearing a racially derogatory costume. Nearly without exception, the cases relate to speech or expression that have a nexus to government employment. Either because it involves criticism of the employer or its programs or policies, or because it is within the scope of the speaker's employment or, because it directly affects the speaker's colleagues.

In this case, the speaker, the Petitioner, made his Speech completely outside of and away from his place of employment, his employer and his colleagues. The Speech was not about or critical of his employer or of his employer's policies. He spoke as a private citizen on a matter of public concern before a like minded group, his words reaching the greater public only through the miracles of modern technology and without his participation. Under these circumstances, there is a real question as to whether it is legitimate to conclude that such speech, under such circumstances, can be the legitimate concern of the government.

Waters focuses on the government's interest in achieving its goals as effectively and efficiently as possible, at 1888. The goal of the government as employer is defined by the particular law that defines the tasks of the particular agency involved. None of the legitimate goals of any government agency involves the imposition of any particular ideology or philosophy.

Similarly, there must be a legitimate connection between the impact of the speech complained of, and the efforts of the government to perform its tasks. This does not, and should not include the mere receipt of angry letters and criticism from the general public or the media; although that is, in large part, the nature of the disruption feared by the Respondents. (See 128a, and 131a.) How much weight is such disruption worth, especially when compared to the need to preserve free speech and academic freedom, and in light of the circumstances under which the Petitioner, as a private citizen, made the Speech?

The application of *Waters* to *Jeffries* stretched the principals of *Waters* beyond the boundaries of the employer-employee relationship, crossing over into the realm of government as soverign where the ability to restrict speech is far more limited (*Waters* at 1988; *Rankin v. McPherson*, 483 U.S. 378 at 395; *Pickering* at 568). The question for this Court is how far the government can go in monitoring the speech of its employees in what is essentially their private lives. It is well established that no public employee sheds his or her rights simply because they become a public employee. Each public employee still has a private life that, even when known to the employer, should be off limits. Here, it cannot be disputed that the Speech did not affect the effective or efficient operation of the Respondents' enterprise. We only have the undefined concerns of the Respondents relative to fear of minor disruptions and conflicts in viewpoints and idealogy. All of the foregoing must lead us to the conclusion that the Respondents had no basis upon which to act and that the Second Circuit failed to consider all of the relevant facts before stretching *Waters* to cover *Jeffries*.

This case is not a public employee case in the same sense as all of the others. If *Waters* is intended to cover a case in which the only real issue is a conflict in idealogy not affecting the ability of the employee or the employer to function, then *Waters* can be used to provide the government as sovereign with the same powers it intends to give the government as employer, and that is contrary to all of the applicable case law.

"The balancing test articulated in *Pickering* is truly a balancing test. (*Zamboni v. Stamler,* 847 F.2d 73). It is intended to require an examination of the interests of the speaker versus the interests of the government in the effective and efficient fulfillment of its responsibilities to the public. *Connick v. Meyers,* 461 U.S. 138. The interrelated factors used by the Courts in weighing the competing interests of the employer and the employee are:

1. the need for harmony in the office or work place;
2. whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or could cause the relationship to deteriorate;
3. the time, manner, and place of the speech;
4. the context in which the dispute arose;
5. the degree of public interest in the speech; and
6. whether the speech impeded the employee's ability to perform his or her duties.

Tindle v. Caudell, 1995 WL 341529 (8th Cir. Ark).

The test is intended to determine whether the speech undermines the effective functioning of the public employer's enterprise. *Rankin v. McPherson.* Under

Waters, this hasn't changed. Indeed, since *Waters*, this court, in its opinion in *U.S. v. National Treasury Employees Union, et al.*, has reaffirmed the principles of *Pickering* and *Connick*, stating that "where . . . government employees seek to exercise their rights as citizens to comment on matters of public interest . . . the government *must* be able to satisfy a balancing test of the type set forth in *Pickering.*" Citing *Connick* at 1007.

If the government *must* satisfy a balancing test, then the Courts must consider the factors comprising the weights on the scales. These weights on the Respondents' side would include their concern about their "Mission" and their concern about the effect of the Speech on the future effectiveness of their operation. (In fact, the Department, the College, and the University prospered following the Speech, experiencing record increases in enrollment and funds from private sources. The downside for the University occurred at the hands of the legislature and the Executive Branch through budget cuts and tuition increases, which affected the entire CUNY system.[1]) What weight would these factors have? If we exercise these interests in light of the interest of the Petitioner, we must conclude that they carry very little weight and that the scale would have, necessarily, tilted in favor of Petitioner. To look forward at its reasonable expectation of disruption, the Respondents would have to first look back to find real circumstances upon which to base their fear. In so doing, the Respondents, as of March 1992, would have found that following the Speech, the level of efficiency and effectivenss in the workplace had not been materially affected by the Speech or its aftermath. The decision of the Second Circuit should be reversed.

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[1]Source: City University of New York, as reported by the New York Times, January 9, 1994.

III.

REASONABLE EXPECTATION REQUIRES DEFINITION AND THE ESTABLISHMENT OF PARAMETERS NOT EXAMINED BY THE SECOND CIRCUIT AND NOT SET FORTH IN *WATERS*.

The Respondents have relied upon *Waters* and its acceptance of reasonable expectation as the basis for justifying government action based on the speech of an employee. What *Waters* failed to do was to provide the lower courts with some guidelines as to the parameters of the application of its principles. In *Jeffries*, the Respondents took decisive action against Petitioner eight (8) months after the Speech and following numerous investigations and inquiries designed to find some link between the Speech and some disruption in the workplace. After eight (8) months, the Respondents could not show that the Speech had impacted, in any way, on the ability of the Petitioner, the Department, the College or the University to effectively and efficiently function. Notwithstanding this reality, the Respondents, collectively, on the recommendation and at the insistence of Respondents Reynolds and Harleston, removed the Petitioner from his position as Chairman.

After a trial, during which the Respondent produced no evidence of actual harm and no evidence of a reasonable expectation of disruption as of March of 1992, we are confronted with a series of jury responses in support of its verdicts in favor of the Petitioner, which appear to be contradictory. In light of *Waters*, the Second Circuit has construed the contradiction in Respondents' favor and has determined that Respondents are entitled to judgment without the benefit of a new trial. The Respondents, therefore, are provided with the benefit of enjoying the luxury of the new parameters set by *Waters*,

without having been burdened at trial with the requirement that they prove the elements of their expectations of disruption. On the other hand, the Petitioner is burdened with the disadvantage of not having had an opportunity to hear and fully respond in the factual record to Respondents' now dominant position, to wit, that it acted based on a reasonable expectation of disruption. The position Respondents now rely upon was developed after the fact, following the April 21, 1993 Order of the District Court (82a) which determined that the Speech was protected and not subject to dissection to have its parts selectively presented out of context. Prior to that time, the Respondents' position was that the Petitioner was removed because of the Speech, because of its impact, and because he performed poorly as Chair. Little, if any, testimony at trial dealt with anything else. No testimony or evidence was presented regarding the Respondents' reason for removing the Petitioner from his Chair in March of 1992. Although it was clear to the jury that the removal was in retaliation for the Speech, the Respondents' witnesses testified that the March 1992 vote had nothing to do with Petitioner. (See Fink testimony 133a and Carrion testimony 134a.)

Now, thanks to the intervening *Waters* decision and the apparently inconsistent jury verdicts, Respondents have the benefit of an affirmative defense handed to them which they did not have the burden of having to prove at trial. As a consequence, Respondents should not be afforded the opportunity to take advantage of any presumption of validity or weight in the *Pickering* balance test. Such a presumption is unfair and unjust to an employee, and gives the employer an unfair advantage. So, too, does the absence of some limitation or sliding scale on the impact and weight of the expectation when it is applied to justify an act occurring some eight (8)

months after the Speech and following a factual history that neither supports nor justifies anything but an expectation of the most minor of disruptions, almost exclusively limited to what amounts to public relations responses. Responses that have no real impact on the ability of the Respondents to effectively achieve the goals of the public institution they are charged with operating.

The courts should be subject to some guidelines that recognize that expectation cannot last forever. That, at some point, they must give way to reality. This is especially so when the employer, for whatever reason, does not act quickly following the employee's speech. As time goes on, the weight of the expectations must, of necessity decrease, as experience and practice provide the public employer with a true understanding of the impact of an employee's speech.

According to the language in *Waters*, an employer is required to "act on the facts as it reasonably finds them to be and as it in good faith finds them to be." The courts, in employing the *Waters* principal and the *Pickering* balance, must also be mindful of what the facts were as the employer found them to be. The Circuit Court failed to do this and took a one-two approach, determining first, without foundation, that the Respondents acted exclusively out of a reasonable expectation of disruption and then concluding immediately, without weighing or balancing the interests that this entitled Respondents to judgment in their favor.

IV.

FIRST AMENDMENT RIGHTS AND ACADEMIC FREEDOM ARE SIGNIFICANT RIGHTS ENTITLED TO GREAT WEIGHT.

The First Amendment is the foundation of all of our freedoms. It is intended to protect our ability, even as public employees, to participate as full citizens in the rights and priveleges available in America. In particular, speech on matters of public concern is that speech which lies at the heart of the First Amendment's protection. *First Nat. Bank v. Bellatti*, 435 U.S. 765, 776. Unlike the doctrine created by *Waters*, the doctrine supporting the First Amendment has a long and steady tradition.

"The very object of adopting the First Amendment was to put the freedoms protected there completely out of the area of any congressional control that may be attempted through the exercise of precisely those powers that are now being used to 'balance' the Bill of Rights out of existence. . . . The creation of 'tests' by which speech is left unprotected under certain circumstances is a standing invitation to abridge it." J. Black dissenting; *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961). Justice Black's dissent rings familiar in the *Jeffries* case.

We do not believe that the First Amendment is absolute, but the point Justice Black raises about weak balancing tests leading to significant abridgement of the Bill of Rights is certainly a valid one.

The court of appeals in *Jeffries* has taken an additional step beyond *Waters* and created a test without balance and a level of uncertainty for government employees, particularly in the academic arena. The Court in *Keyishian v. Board of Regents*, described this as a "highly efficient in terrorem mechanism," stating, "It would be a bold teacher who would not stray as far as possible from

utterances or acts which might jeopardize his living. . . . The result must be to stifle that free play of the spirit which all teachers ought especially to cultivate and practice." That has been the result here where the court of appeals has all but ignored the weight of academic freedom by failing to balance the interests of the parties.

The courts have rarely been persuaded by arguments of significant state interest when weighed against the restraint such practices placed on fundamental freedoms. The Court in *Keyishian*, although recognizing the legitimacy of the state's interest in protecting its educational system, stated "Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that stifle fundamental personal liberties when the end can be more narrowly achieved." *Keyishian v. Board of Regents*, 87 S.Ct. 675, 385 U.S. 589 (1967) citing *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252 (19___). Just as regulations must be narrowly tailored to serve the objective of government without intruding unnecessarily into the rights of the individual, so must the test utilized in balancing the goverment's interest in effectively carrying out its mission be narrowly read.

In balancing the government's interest against that of teachers and educators, the Courts have been especially vigilant in the area of academic freedom. When academic freedom is at issue, the scale must be heavily weighted in favor of the dissemination of ideas, and open discourse. "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is, therefore, a special concern of the First Amendment." *Keyishian*, 87 S.Ct. 683.

"The essentiality of freedom in the community of American universities is almost self-evident. No one should under estimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation. . . . Teachers and students must always remain free to inquire, to study and evaluate, to gain new maturity and understanding: otherwise our civilization will stagnate and die."

The issue before this Court is not simply a single individual scholar's right to express his learned viewpoint, balanced against the government's interest in maintaining its tranquility. It is the Nation's future. It is the right of the people, our future leaders, "to be exposed to an exchange of ideas which discovers truth "out of a multitude of tongues." *Keyishian* citing *Sweezy v. State of New Hampshire*, 354 U.S. 234, 250.

This fundamental right, when balanced against a low standard such as the mere possibility of disruption, must triumph. "First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Keyishian* citing *NAACP v. Buttons*, 371 U.S. 433. The government cannot accomplish, through the back door, what it cannot do through the front. The legislature could not enact a statute which makes it unlawful for a teacher, public employee, etc., to engage in a public speech on a matter of public concern which individuals acting on behalf of the government, simply believe would be disruptive to the goals of the employer. Such a statute would be stricken as being extremely vague and unconstitutional. Yet, this is the end result of the court of appeals' holding in *Jeffries*.

"When one must guess what conduct or utterance may lose him his position, one necessarily will steer far wider of the unlawful zone." "For the threat of sanctions may deter almost as potently as the actual application of sanctions." *Keyishian*, at 87 S.Ct. 675 at 684, citing *Speiser v. Randall*, 357 U.S. 513 at 526 and *NAACP v. Button*, 371 U.S. 433.

"The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed." *Keyishian, Id.*

The Court has repeatedly reasoned that the greater the importance of safeguarding the overthrow of our institutions "the more imperative is the need to preserve inviolate the constitutional rights of free speech . . . in order to maintain the opportunity for free political discussion." *Keyishian* citing *DeJorge v. State of Oregon*, 299 U.S. 353.

This reasoning is lost in the decision of the court of appeals and, as a consequence, threatens the very foundation of free speech and academic freedom.

The restriction of speech viewed in the short term may give the impression of being advantageous to society's goals. However, the net result often is the undercutting of the democratic process. This is particularly the case when viewpoints seeking to enter the "marketplace of ideas" are turned away at the gate.

CONCLUSION

FOR THE REASONS STATED HERE, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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